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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 61

E. FRANKLIN BREWSTER, PETITIONER,

vs.

BERT P. GAGE, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 4, 1929

CERTIORARI GRANTED MAY 13, 1929

(34,116)

(34,116)

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

No. 3151

E. Franklin Brewster, Plaintiff,

against

Bert P. Gage, Collector of Internal Revenue, Defendant

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's atorneys or if the complaint is not served with this summons to serve a notice of appearance within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable John R. Hazel, Judge of the District Court of thee United States of America, at the City of Buffalo, in the Western District of New York, and the seal of said Court, this 19th day of July in the year of our Lord one thousand nine hundred and twenty-six.

Harris S. Williams, Clerk. Messrs. Castle and Fitch, Plaintiff's Attorneys. Office and Post Office address: 910 Union Trust Bldg., Rochester, New York. (Seal.)

[fol. 2] In United States District Court

[Title omitted]

Complaint

The plaintiff above named by Castle & Fitch, his attorneys, complaining of the defendant, respectfully shows to this Court:

First. That the plaintiff duly executed and filed with the Collector of Internal Revenue at Buffalo, N. Y. income tax returns for the calendar years 1920, 1921 and 1922 and duly paid the amount of the taxes as shown by said returns.

Second. That thereafter a review and audit of said returns was made by the United States Treasury Department and on or about December 10, 1924, the Commissioner of Internal Revenue, assuming to act under the Statutes of the United States, found due and assessed additional income taxes of

$1,799.68	for year	1920
108.94	" "	1921
and 493.28	" "	1922

aggregating in all $2,401.90 as plaintiff was advised by the Treasury Department's letter dated December 10, 1924, [fol. 3] entitled "IT:PA-2-HLM-203".

Third. That thereafter and on or about the 9th day of February, 1926, the plaintiff under threat of distraint paid to defendant under protest said additional taxes of $2,401.90.

Fourth. That claim for refund of said additional taxes was duly filed by the plaintiff with the defendant on or about January 15, 1926, but said claim has not been allowed or paid although six months have elapsed since the filing thereof as aforesaid. That on or about April 6, 1926, plaintiff received a letter from C. R. Nash, Assistant to the Commissioner of Internal Revenue, advising that plaintiff's claim would be rejected.

Fifth. That said additional taxes were erroneously and illegally assessed for the following reasons:

As appears from the report of W. P. Mays, Internal Revenue Agent in Charge, dated February 11, 1924, the letter of the Treasury Department dated April 3, 1924, entitled "IT:PA:2-FPH-206-APP" and the Department's letter dated December 10, 1924, entitled "IT:PA-2-HLM-203" said additional taxes were assessed because of profits on sales of securities. In estimating these profits the department valued securities which taxpayer had received under the will of his father, the late E. Frank Brewster, at

their appraised value at the time of testator's death rather [fol. 4] than at their value at the time of distribution as should have been done under the decisions of the U. S. Board of Tax Appeals in Appeal of F. W. Matthiessen Jr. Vol. 2 U. S. B. of T. A. Reports p. 921.

Wherefore plaintiff demands judgment for the sum of $2,401.90 with interest thereon from February 9, 1926, together with the costs of this action.

Castle & Fitch, Attorneys for Plaintiff, 910 Union Trust Bldg., Rochester, N. Y.

Duly sworn to by E. Franklin Brewster. Jurat omitted in printing.

[fol. 5] In United States District Court

[Title omitted]

Answer

The defendant above named by Richard H. Templeton, United States Attorney in and for the Western District of New York, answering the complaint herein:

1. Admits the allegations contained in paragraphs of said complaint designated One, Two, Three and Four.

2. Denies the allegations contained in paragraph of said complaint designated Five.

Wherefore the defendant demands judgment against the plaintiff dismissing the complaint herein together with costs and disbursements of this action.

Richard H. Templeton, United States Attorney in and for the Western District of New York. Office and Post Office Address: 404 Federal Bldg., Buffalo, N. Y.

[fol. 6] *Duly sworn to by Richard H. Templeton. Jurat omitted in printing.*

[fol. 7] PLAINTIFF'S EXHIBIT 6

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. That the plaintiff duly executed and filed with the Collector of Internal Revenue for the Twenty-eighth District of New York his individual income tax returns for the calendar years 1920, 1921 and 1922, and duly paid the income taxes disclosed by said returns.

2. That thereafter the Commissioner of Internal Revenue upon additional information and facts submitted to him directed a review and audit to be made of said returns and as [fol. 8] a result of such review and audit determined that additional income taxes were due from the plaintiff in the following amounts: $1,799.68 for the year 1920; $94.94 for the year 1921; and $453.59 for the year 1922, or a total of $2,348.21.

3. That said additional income taxes in the amount of $2,348.21 were duly assessed, and paid by the plaintiff under protest on or about the 9th day of February, 1926, together with interest in the amount of $53.69.

4. That on or about the 15th day of January, 1926, the plaintiff filed with the defendant a claim for refund for the year 1920 in the amount of $1,799.68; for the year 1921 a claim for refund in the amount of $94.94 and interest in the amount of $14.00, or a total of $108.94, and for the year 1922 a claim for refund in the amount of $453.59 and interest in the amount of $39.69, or a total of $492.28. That on or about the 9th day of April, 1926, the Commissioner of Internal Revenue rejected each of said claims for refund in its entirety.

5. That under the will of his father, E. Franklin Brewster, deceased, the plaintiff received certain securities, some of which he sold in the years 1920, 1921 and 1922; that on April 19, 1920, at a Surrogate's Court at Rochester in the State of New York a decree was entered (a copy whereof is hereto annexed and made a part hereof and marked Exhibit "A") whereby the executors under the will of said E. Franklin Brewster were directed to distribute certain [fol. 9] securities to the plaintiff; that certain securities ordered distributed by the Surrogate's Court and subsequently sold by the plaintiff, the values at which they were distributed, the appraised values for Federal estate tax purposes at the death of the said E. Franklin Brewster, the value at the date of actual receipt by the plaintiff, the year of sale, and the amount received therefor are as follows:

Year sold		Securities	Sale price	Appraised value	Value June 28, 1920, when received
1920	22 Shs.	Eastman Kodak....	$11,550.00	$9,350.00	$11,770.00
1920	25 "	Lincoln Bank.....	6,250.00	5,500.00	6,500.00
1920	15 "	American Chicle pfd.	944.40	945.00	945.00
1921	66 "	Childs Co. com.....	6,257.46	4,290.00	5,742.00
1922	22 "	Bankers Trust Co...	8,024.72	5,398.58	7,700.00
1922	60 "	General Cigar Co. com. (United Cigar Stores)....	4,631.10	2,700.00	3,900.00
			$37,657.68	$28,183.58	$36,557.00

6. In computing the profit or loss on the sale of said securities the Commissioner of Internal Revenue used as a basis of cost to the plaintiff the values at the date of death of E. Franklin Brewster, as appraised for Federal estate tax purposes.

Castle & Fitch, Attorneys for Plaintiff. Richard H. Templeton, R. A. G., Attorney for Defendant.

[fol. 10] EXHIBIT "A" TO STIPULATION

At a Surrogate's Court held in and for the County of Monroe, at the Court House, in the City of Rochester, N. Y., on the 19th day of April, 1920.

Present: Hon. Selden S. Brown, Surrogate.

SURROGATE'S COURT, MONROE COUNTY

In the Matter of the Final Judicial Settlement of the Accounts of ROCHESTER TRUST & SAFE DEPOSIT COMPANY, HIRAM R. WOOD, and E. FRANKLIN BREWSTER, JR., as Executors of the Last Will and Testament of E. Frank Brewster, Deceased.

Rochester Trust & Safe Deposit Company, Hiram R. Wood and E. Franklin Brewster, Jr., as executors of the last will and testament of E. Frank Brewster, late of the City of Rochester aforesaid, deceased, having heretofore made application to the Surrogate of the County of Monroe for a final judicial settlement of their accounts as such executors and a citation having been issued pursuant to statute directed to all persons interested in the estate of said deceased citing and requiring them, and each of them, per-
[fol. 11] sonally to be and appear before said Surrogate at his office in said City of Rochester on the 6th day of April, 1920 at 10 o'clock in the forenoon of that day, then and there to attend such final judicial settlement; and the said citation having been returned with proof of due service thereof on the following named persons, to wit: William M. Brewster, Emily Brewster Frelinghuysen, Caroline Brewster Knight, Sallie Brewster Mulligan, Ridgway Knight, George Knight, Wesley Brewster Mulligan, Carolyn Brewster Mulligan, Vincent H. Riordan, Collector of Internal Revenue, Daniel C. Roper, Commissioner of Internal Revenue, Eugene M. Travis, Comptroller of the State of New York, Charles L. Pierce, Corporation Counsel of the City of Rochester, New York Life Insurance Company, Church Pension Fund, Seward Lippincott and George Hayt, legatees, next of kin, heirs at law, creditors and other persons interested in the estate of said E. Frank Brewster, late of the City of Rochester, deceased; and the said executors having appeared on the return day of said citation by Messrs. McGuire & Wood, their attorneys, the said E. Franklin Brewster, Jr., one of said executors as a claimant against said estate for certain shares of stock of the California Packing Corporation, by [illegible]rge S. Van Schaick, Esq., his attorney, and no oth[illegible]rsons or corporations having appeared in any manner, and Burlew Hill, Esq., by an appropriate order of this court, having been duly

appointed and having duly qualified and consented in writing to act as special guardian of said Ridgway Knight, [fol. 12] George Knight, Wesley Brewster Mulligan and Carolyn Brewster Mulligan, who are infants; and the said executors having duly rendered their accounts under oath before the said Surrogate showing their transactions up to and including December 31, 1919, and the said accounts having been filed, together with the vouchers in support thereof, and the matter having been duly adjourned to this day, and the said executors having filed their supplemental account bringing their transactions down in full from December 31, 1919 to and including this day, to wit: April 19, 1920; and the counsel for said E. Franklin Brewster, Jr., as the claimant of the stock of said California Packing Corporation having presented the evidence in support of his said claim showing that he, the said claimant, was and at all times had been the true and actual owner of said stock subject to the payment of an indebtedness to the decedent in the sum of six thousand three hundred fifty dollars ($6,350) with interest thereon from November 8, 1916, upon which had been paid on account thereof prior to the death of the decedent on May 20, 1918 in various payments the sum of four hundred ($400) dollars, and that said stock had been held by the decedent as collateral security for the payment of said indebtedness; and Hiram R. Wood, Esq., one of the executors and a member of the firm of McGuire & Wood, attorneys for the executors, having testified as to the extent and value of the legal services performed for said executors [fol. 13] and estate by said firm of McGuire & Wood and an allowance having been made therefor as hereinafter indicated; and the said special guardian having reported to the court that he had examined the papers, proceedings, accounts and vouchers and that the said infants had been properly served with said citation and had been duly brought under the jurisdiction of the court, that said accounts were regular and sufficient on their face and that proper vouchers had been filed by the executors showing the payments for which they claimed credit; and said Surrogate having considered the evidence and the report of said special guardian and having examined the said vouchers and accounts, now here finds the state and condition of the said accounts to be as stated and set forth in the following summary statements thereof, made by the said Surrogate

as finally settled and adjusted by him, to be recorded with, and taken to be a part of the decree in this matter, to wit:

Summary Statement of Account Dated March 5, 1920, Covering Period to December 31, 1919

The executors are chargeable as follows:

Receipts of principal as per Schedule A, column 1	1,239,030.03	
Net profits on sales and distributions as per Schedule B	50,993.84	
[fol. 14] Receipts of income as per Schedule A, column 2	77,955.92	

And are to be credited as follows:

Debts paid as per Schedule B, column 1		336,887.15
Transfer taxes as per Schedule B, column 3		78,303.03
Administration expenses as per Schedule B, column 4		758.38
Property on hand as per Schedule C		291,213.31
Distributions as per Schedule D		567,832.80
Current interest and expenses as per Schedule B, column 2		21,794.40
Cash on hand		71,190.72
	$1,367,979.79	$1,367,979.79

Summary Statement of Account Dated April 19, 1920, Covering Period From January 1, 1920, to April 19, 1920

The executors are chargeable as follows:

Property on hand January 1, 1920	291,213.31
[fol. 15] Cash on hand January 1, 1920	71,190.72
	362,404.03

Receipts of principal January 1 to April 19, 1920 as per Schedule A	309.77	
Net increase in value of securities over inventory values as per Schedule C	53,262.94	
Receipts of income January 1 to April 19, 1920 as per Schedule A	10,776.25	
And are to be credited as follows:		
Debts paid from principal January 1 to April 19, 1920 as per Schedule B		15,174.77
Current interest, income taxes, etc., as per Schedule B		6,354.42
Securities on hand as per Schedule C		350,411.25
Cash balance		54,812.55
	$426,752.99	$426,752.99

And it appearing that the said executors have fully accounted for all the moneys and property of the estate of said deceased which have come into their hands as such [fol. 16] executors, and their account and supplemental account showing their transactions down to and including April 19, 1920 having been finally adjusted by said Surrogate and summary statements of the same having been made as above and herewith recorded, it is hereby

Ordered, adjudged and decreed that the said accounts be, and the same are hereby, finally and judicially settled and allowed as filed and adjusted; and it is further

Ordered, adjudged and decreed that the claims of alleged creditors heretofore made by New York Life Insurance Company, Seward Lippincott and George Hayt be, and the same are hereby, dismissed; and it is further

Ordered, adjudged and decreed that said two hundred (200) shares of stock of the California Packing Corporation found in the possession of the testator by said execu-

tors and inventoried by them as a part of his estate are and at all times were the individual absolute property of said E. Franklin Brewster, Jr., subject to the payment by him of an indebtedness to said decedent in the sum of six thousand three hundred fifty ($6,350) dollars with interest thereon from November 8, 1916, less payments made by him to apply thereon prior to the date of said decedent's death on May 20, 1918, aggregating four hundred ($400) dollars, the principal and interest of said indebtedness to the date [fol. 17] of the death of said decedent being six thousand five hundred thirty-four dollars and twenty cents ($6,534.20). That said stock was held by the decedent as collateral security for said indebtedness, that said claimant is entitled to the possession of the certificates therefor upon payment to the said executors of said indebtedness with interest to the time of payment, and said executors are hereby directed upon receipt of said indebtedness with interest to deliver over the certificates representing said shares of stock; and the said executors are hereby credited with the difference between the inventory value of said stock with which they have heretofore been charged, and the amount of the said indebtedness for which the same was held as collateral. And it is further

Ordered, adjudged and decreed that out of the balance of the moneys and property remaining in the hands of the said executors allowances be made and paid by the said executors as follows:

Burlew Hill, Esq., fees and allowance as special guardian one thousand ($1000) dollars.

McGuire & Wood, fees and allowance as attorneys for the executors from and including the probate of the will to and including the filing of the final account of the executors and the entry of the order discharging them of their trust, the sum of twenty-five thousand ($25,000) dollars together with disbursements to this day amounting to four [fol. 18] hundred seventy-three dollars and eighty-three cents ($473.83).

E. Franklin Brewster, Jr., or George S. Van Schaick, Esq., upon contest as to ownership of said stock, costs one hundred seventy ($170) dollars and disbursements fifty ($50) dollars, making a total of two hundred twenty ($220) dollars.

Rochester Trust & Safe Deposit Company fees as executor, the sum of thirteen thousand nine hundred eighty-three dollars and seventy-four cents ($13,983.74), which sum does not include fees (which will hereafter be allowed) for receiving and paying out the undistributed securities hereinafter set forth, amounting in all to the sum of fifty-one thousand four hundred eighty-eight dollars and seventy-five cents ($51,488.75).

Hiram R. Wood, Esq., fees as executor, the sum of thirteen thousand nine hundred eighty-three dollars and seventy-four cents ($13,983.74), which sum does not include fees (which will hereafter be allowed) for receiving and paying out the undistributed securities hereinafter set forth, amounting in all to the sum of fifty-one thousand four hundred eighty-eight dollars and seventy-five cents ($51,488.75).

E. Franklin Brewster, Jr., fees as executor the sum of thirteen thousand nine hundred eighty-three dollars and seventy-four cents ($13,983.74), which sum does not include [fol. 19] fees (which will hereafter be allowed) for receiving and paying out the undistributed securities hereinafter set forth, amounting in all to the sum of fifty-one thousand four hundred eighty-eight dollars and seventy-five cents ($51,488.75). And it is further

Ordered, adjudged and decreed that the said executors be, and they are hereby, directed to distribute the following property shown to be in their hands by their said supplemental account of March 19, 1920, in equal shares as follows: One-fifth (1/5) part thereof to E. Franklin Brewster, Jr., one-fifth (1/5) part thereof to William M. Brewster, one-fifth (1/5) part thereof to Emily Brewster Frelinghuysen, one-fifth (1/5) part thereof to Rochester Trust & Safe Deposit Company as trustee for Caroline Brewster Knight, et al., and one-fifth (1/5) part thereof to the Rochester Trust & Safe Deposit Company as trustee for the benefit of Sallie Brewster Mulligan et al., to wit:

To E. Franklin Brewster, Jr.

Shares	Stocks	Value
15	American Chicle pfd.	1,080
2	American Cons. Pine Fiber Co. com.	0
2	American Cons. Pine Fiber Co. pfd.	0

Shares	Stocks	Value
40	American Tobacco Securities Corp. com.	2,510
	American Tobacco Co. script par $250	512.50
[fol. 20] 512	Bagdad Chase Mining & Milling Co. of 1 £ each	0
22	Bankers Trust Co.	8,514
20	British-American Tobacco Co.	435
66	Childs Co. com.	5,940
22	Eastman Kodak Co. com.	12,100
20	Havana Tobacco Co. pfd.	40
54	Imperial Tobacco Co. of 1 £ each	567
25	Lincoln National Bank	6,875
40	Pierce Oil Co. com.	730
10	Rochester, Lockport & Buffalo Ry. Corp. pfd.)	500
15	Rochester, Lockport & Buffalo Ry. Corp. com.)	....
37	Rochester Trust & Safe Deposit Company	9,250
42	Stuyvesant Insurance Co.	2,100
20	Submarine Boat Corp.	290
60	United Cigar Mfg. Co. com.	4,140
	Bonds	
Par $3,000,	Third Liberty Loan	2,601
		$58,184.50

To William M. Brewster

Shares	Stocks	Value
15	American Chicle pfd.	1,080
2	American Cons. Pine Fiber Co. com.	0
2	American Cons. Pine Fiber Co. pfd.	0
40	American Tobacco Securities Corp. com.	2,510
[fol. 21]	American Tobacco Co. script, par $250	512.50
512	Bagdad Chase Mining & Milling Co. of 1 £ each	0
22	Bankers Trust Co.	8,514
20	British-American Tobacco Co.	435
66	Childs Co. com.	5,940
22	Eastman Kodak Co. com.	12,100
20	Havana Tobacco Co. pfd.	40

Shares	Stocks	Value
54	Imperial Tobacco Co. of 1 £ each	567
25	Lincoln National Bank	6,875
40	Pierce Oil Co. com.	730
10	Rochester, Lockport & Buffalo Railway pfd.)	....
15	Rochester, Lockport & Buffalo Railway com.)	...
37	Rochester Trust & Safe Deposit Company	9,250
42	Stuyvesant Insurance Company	2,100
20	Submarine Boat Corp.	290
60	United Cigar Mfg. Co. com.	4,140

Bonds

Par $3,000,	Third Liberty Loan	2,601
		$58,184.50

To Emily Brewster Frelinghuysen

Shares	Stocks	Value
15	American Chicle pfd.	1,080
2	American Cons. Pine Fiber Co. com.	0
2	American Cons. Pine Fiber Co. pfd.	0
[fol. 22] 40	American Tobacco Securities Corp.	2,510
	American Tobacco Co. script par $250	512.50
512	Bagdad Chase Mining & Milling Co. of 1 £ each	0
22	Bankers Trust Co	8,514
20	British-American Tobacco Co	435
66	Childs Co. com.	5,940
22	Eastman Kodak Co. com	12,100
20	Havana Tobacco Co. pfd	40
54	Imperial Tobacco Co. of 1 £ each	567
25	Lincoln National Bank	6,875
40	Pierce Oil Co. com	730
10	Rochester, Lockport & Buffalo Ry. Corp. pfd.)	500
15	Rochester, Lockport & Buffalo Ry. Corp. com.)	....
37	Rochester Trust & Safe Deposit Company	9,250
42	Stuyvesant Insurance Company	2,100
20	Submarine Boat Corp	290
60	United Cigar Mfg. Co. com	4,140

Bonds

Par $3,000, Third Liberty Loan		2,601
		$58,184.50

To Rochester Trust & Safe Deposit Company as Trustee for Caroline Brewster Knight et al.

Shares	Stocks	Value
15	American Chicle pfd	1,080
[fol. 23] 2	American Cons. Pine Fiber So. com	0
2	American Cons. Pine Fiber Co. pfd	0
40	American Tobacco Securities Corp. com	2,510
	American Tobacco Co. script par $250	512.50
512	Bagdad-Chase Mining & Milling Co. of 1 £ each	0
22	Bankers Trust Co	8,514
20	British-American Tobacco Co	435
66	Childs Co. com	5,940
22	Eastman Kodak Co. com	12,100
20	Havana Tobacco Co. pfd	40
54	Imperial Tobacco Co. of 1 £ each	567
25	Lincoln National Bank	6,875
40	Pierce Oil Co. com	730
10	Rochester, Lockport & Buffalo Ry. Corp. pfd.)	500
15	Rochester, Lockport & Buffalo Ry. Corp. com.)	....
37	Rochester Trust & Safe Deposit Company	9,250
42	Stuyvesant Insurance Co	2,100
20	Submarine Boat Corp	290
60	United Cigar Mfg. Co. com	4,140

Bonds

Par $3,000, Third Liberty Bonds	2,601
	$58,184.50

[fol. 24] To Rochester Trust & Safe Deposit Company as Trustee for Sallie Brewster Mulligan et al.

Shares	Stocks	Value
15	American Chicle pfd	1,080
2	American Cons. Pine Fiber Co. com	0
2	American Cons. Pine Fiber Co. pfd	0
40	American Tobacco Securities Corp. com	2,510
	American Tobacco Co. script par $250	512.50
512	Bagdad Chase Mining & Milling Co. of 1 £ each	0
22	Bankers Trust Co	8,514
20	British-American Tobacco Co	435
66	Childs Co. com	5,940
22	Eastman Kodak Co. com	12,100
20	Havana Tobacco Co. pfd	40
54	Imperial Tobacco Co. of 1 £ each	567
25	Lincoln National Bank	6,875
40	Pierce Oil Co. com	730
10	Rochester, Lockport & Buffalo Ry. Corp. pfd.	500
15	Rochester, Lockport & Buffalo Ry. Corp. com	....
37	Rochester Trust & Safe Deposit Company	9,250
42	Stuyvesant Insurance Co	2,100
20	Submarine Boat Corp	290
60	United Cigar Mfg. Co. com	4,140

Bonds

[fol. 25]	Par $3,000, Third Liberty Loan	2,601
		$58,184.50

And it is further

Ordered, adjudged and decreed that the balance of the moneys and property in the hands of said executors amounting to forty-four thousand one hundred ninety dollars and forty-five cents ($44,190.45) be retained by them for the purpose of the payment of adjustments of estate, transfer, income and other taxes, if any there may be, and other proper payments of disbursements on account of said estate until the further order of this court, the said property being as follows, to wit:

Shares	Stocks	Value
80	American Tel. & Tel.	7,690
½	Childs Co. com.	45
55	Great Northern Railway pfd.	4,180
50	Northern Pacific Railway	3,850
1	Rochester & Genesee Valley RR.	80
50	Southern Pacific com.	4,856.25
50	Union Pacific com.	5,925
128	Western Union Telegraph Co.	11,200
2	Tom Wilson Knife	0
Par	**Bonds**	
500	Bridgewater Land Ass'n 4's 1927	400
300	Century Club 5's 1933	270
2000	Havana Tobacco 5's 1922	1,000
[fol. 26] 2500	Ontario Power Co. 5's 1943	2,062.50
7750	Rochester Railway & Light Co. 5's 1954	6,355
5500	Rochester Telephone 5's 1933	3,575
		51,488.75

of which the executors may dispose of so much as may be necessary in order to obtain funds with which to make the disbursements and payments above ordered leaving a balance of forty-four thousand one hundred ninety dollars and forty-five cents ($44,190.45) as above stated, for which they shall remain accountable. And it is further

Ordered, adjudged and decreed that this accounting be adjourned until the 12th day of July, 1920 at 10:30 o'clock A. M., the court hereby retaining jurisdiction of the proceeding and of the parties heretofore cited for the purpose of making such further order and decree with reference to the matter as to it may seem just and proper.

Selden S. Brown, Surrogate.

[fol. 27] In United States District Court

[Title omitted]

Castle & Fitch, Rochester, New York, for Plaintiff.

Richard H. Templeton, United States Attorney, Buffalo, N. Y., C. M. Charest, General Counsel, Bureau of Internal

Revenue, J. D. Smith, Special Attorney, Bureau of Internal Revenue, Washington, D. C., for Defendant.

OPINION

HAZEL, District Judge:

This is an action at law to recover illegally assessed taxes amounting to $2,401.90 with interest from February, 1926. The agreed facts show that plaintiff was one of five residuary legatees of his father who died on May 20th, 1918. After probate of the will, the Surrogate, on April 19th, 1920, ordered distribution to the legatees of certain securities held by the estate, but new certificates of stocks were not delivered until June 29th, 1920, because of delay in transferring the same on the books of the companies. In 1920-21-22, plaintiff sold certain securities distributed to [fol. 28] him, as appears by the stipulation in evidence. The single question submitted for decision is whether, in determining the profits on the sales for the purpose of taxation, the basis of cost of the securities sold is their appraised value for taxation at the time of his father's death, or at the date of the order of distribution, or when the last certificate of transfer was secured. The income tax was assessed by the Commissioner of Internal Revenue on the basis of the value as appraised as of the death of the testator and the profits realized on sales, while in opposition, plaintiff contends that their value should be established as to the date of the Surrogate's decree of distribution, or the time when he actually acquired them.

I have examined the adjudications to which my attention is drawn by counsel for defendant, but I nevertheless incline to the view that the securities in question were not acquired by plaintiff, within the meaning of sec. 213 of the Revenue Act of 1918, until distributed to plaintiff under the Surrogate's decree, and, moreover, that any increased value between the time of the death of his father and the date of distribution should not be included in this income return. While ordinarily the legatee may be said to have acquired property devised to him by will in the sense that he had a vested property right therein, yet such right, being equitable, is not really vested until it is set off or distributed to

him. It was so held in the appeal of F. W. Mathiesson, Jr., 2 B. T. A. 921; and also that the tax accrued on the date [fol. 29] when the legatees divided the assets by which they assigned to each other certain stocks as their respective shares in the estate. But the Court of Claims affirmed the decision of the Board of Tax Appeals, overruling the contention of Mathiesson that the stock was not acquired until the certificates were transferred on the corporation's books, and decreed that omission in this relation did not affect the title. In Alice Fisher Foster vs. Comm'r., Vol. 7 B. T. A. 1137, the Board of Tax Appeals again had substantially the same question before it, and the Board adhered to its ruling in the Matthiesson case.

These decisions are persuasive of their correctness, and, as they involved substantially the same question as here presented, I think it must be held that the basis of the tax is the value of the stock at the time of distribution and not at the time of the testator's death, or when the certificates were delivered to the plaintiff. It makes no difference that the equitable right could have been sold or transferred by plaintiff, since for ascertainment of the basis of the tax there must have been an acquirement by gift, bequest, device, or descent of the securities in question, and by that is implied an absolute ownership and control over them. Therefore, the gain or deducible loss on the securities sold by plaintiff should be based on the difference between their worth on April 19, 1920, and the amount received for them. For these reasons I have signed the findings of law presented by plaintiff, without deeming it necesssary to spe- [fol. 30] cifically dwell upon the various adjudications cited in defendant's brief.

Dated December 27th, 1927.

John R. Hazel, U. S. D. J.

In United States District Court

E. Franklin Brewster, Plaintiff,

against

Bert P. Gage, Collector of Internal Revenue, Defendant

Judgment

The issues in this action having been duly brought to trial before Hon. John R. Hazel, United States District

Judge, at a Term of this Court held at Buffalo, N. Y., on the 18th day of November, 1927, and the court having heard the allegations and proofs of the parties, and after due deliberation having made its decision in writing in favor of the plaintiff against the defendant with Findings of Fact and Conclusions of Law duly filed in the Clerk's office of said Court,

Now, on said decision and on motion of Castle & Fitch, attorneys for the plaintiff, it is

[fol. 31] Ordered, adjudged and decreed that the plaintiff, E. Franklin Brewster, recover of the defendant, Bert P. Gage, Collector of Internal Revenue, the sum of $2,401.90 with interest from February 9, 1926, amounting to $276.22 besides the costs of this action taxed at $33.00, amounting in all to $2,711.12 and have execution therefor. Judgment signed and entered this 16th day of January, 1928.

Harris S. Williams, Clerk.

In United States District Court

[Title omitted]

Plaintiff's Costs and Disbursements

Costs by Statute	$20.00
Clerk's fee on filing complaint & judgment	10.00
Serving summons and complaint	3.00
Cost and disbursements	$33.00

[fol. 32] Costs taxed at $33.00 this 16th day of January, 1928.

Harris S. Williams, Clerk.

Duly sworn to by J. Sawyer Fitch. Jurat omitted in printing.

[fol. 33] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice, that in compliance with the Act of Congress, approved January 31, 1928, this office will ap-

peal from the judgment entered in the above entitled proceedings.

Dated Buffalo, N. Y., February 16, 1928.

Yours, etc., Richard H. Templeton, United States Attorney in and for the Western District of New York. Office & Post Office address: 405 Federal Building, Buffalo, New York.

To Messrs. Castle & Fitch, Attorneys for Plaintiff.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the defendant Bert P. Gage, Collector of Internal Revenue for the Twenty-eighth District of New York (plaintiff in error) and makes and files this, his assignment of errors—upon which he will rely in the prosecution of his appeal in the above entitled cause from the judgment rendered herein by this Court on January 16, 1928.

First. In that the Court erred in holding that under the provisions of Sec. 213 (b) of the Revenue Act of 1918 the stocks in question were "acquired" by the plaintiff at the date of the Surrogate's decree of April 19, 1920.

Second. In that the Court erred in holding that the taxable gain or deductible loss on the sale of the stocks in question should be based on the difference between their worth on April 19, 1920, and the amount received therefor.

Third. In that the Court erred in not holding that the [fol. 35] stocks in question were "acquired" by the plaintiff at the date of the death of his father under the provisions of Sec. 213 (b) of the Revenue Act of 1918.

Fourth. In that the Court erred in not holding that the taxable gain or deductible loss on the sale of the stocks in question should be based on the difference between the value of the stocks at the date of the death of the plaintiff's father and the amount received therefor.

Fifth. In that the Court erred in rendering judgment in favor of the plaintiff and against the defendant.

Richard H. Templeton, United States Attorney,
Attorney for Defendant.

[fol. 36] In United States District Court

[Title omitted]

Plaintiff's Requests for Findings of Fact and Conclusions of Law

Now comes the plaintiff by his attorneys, Castle & Fitch, and requests the court specifically to find the facts as stipulated by the parties.

The plaintiff requests the court to find as matters of law:

1. That the stocks in question were "acquired" by the plaintiff on April 19, 1920, the date of the Surrogate's decree of distribution.

Found. John R. Hazel, D. J.

2. That under the provisions of Section 202 (a) (2) of the Revenue Act of 1918 and Section 202 (a) (3) of the Revenue Act of 1921 the taxable gain or deductible loss on the stocks in question should be based on the difference between their value on April 19, 1920 and the proceeds received therefor.

Found. John R. Hazel, D. J.

Castle & Fitch, Attorneys for Plaintiff.

[fol. 37] In United States District Court

[Title omitted]

Defendant's Requests for Findings of Fact and Conclusions of Law

Now comes the defendant by his attorney, Richard H. Templeton, United States Attorney, and requests the court specifically to find the facts as stipulated by the parties.

The defendant requests the court to find as matters of law:

1. That the stocks in question were "acquired" by the plaintiff at the date of the death of his father under Section 213 (b) (3) of the Revenue Act of 1918.

2. That under the provisions of Section 202 (a) (2) of the Revenue Act of 1918 and Section 202 (a) (3) of the Revenue Act of 1921 the taxable gain or deductible loss on the stocks in question should be based on the difference between their value at the date of the death of the plaintiff's father and the proceeds received therefor.

Richard H. Templeton, United States Attorney, Attorney for Defendant.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO VALUES OF SECURITIES

It is hereby stipulated by and between the attorneys in the above entitled action, that the values of the securities in question, as set forth in the decree of the Surrogate's Court of Monroe County, dated April 19th, 1920, were the actual market values as of that date.

Dated November 18th, 1927.

Castle & Fitch, Attorneys for Plaintiff. Richard H. Templeton, R. A. G., Attorney for Defendant.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION WAIVING CERTIFICATION

It is hereby stipulated by and between the attorneys for the respective parties hereto that the trial of the above action before a jury be and the same hereby is waived.

Castle & Fitch, Attorneys for Plaintiff. Richard H. Templeton, Attorney for Defendant.

[fol. 40] IN UNITED STATES DISTRICT COUET

STIPULATION AS TO RECORD

It is hereby stipulated by and between the attorneys for the parties herein that the foregoing record contains all the papers necessary for the determination of the appeal.

Castle & Fitch, Attorneys for Plaintiff-Appellant.
Richard H. Templeton, U. S. Attorney, by Richard A. Grimm, Asst. U. S. Attorney, Attorney for Defendant-Appellee.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 41] IN UNITED STATES DISTRICT COURT

SCHEDULE D

Distributions

Emily B. Frelinghuysen, Daughter:

1919			
Jan. 1.	1,000 shares pfd. stock Brewster Gordon & Company, Inc.	$100,000.00	
July 1.	50 shares Swift & Co.	6,735.50	
" "	2% dividend on same	100.00	
	50 Swift rights	330.00	
	65 Swift Internacional	3,824.85	
	Dividend on same	78.00	
	55 shares Libby, McNeill & Libby	1,641.11	
	⅓ Household furniture @ inventory value	1,383.50	
			$114,092.96

Caroline B. Knight, Daughter:

	⅓ Household furniture @ inventory value..	1,383.50

Rochester Trust & Safe Deposit Co. as trustee for Caroline B. Knight, Daughter:

[fol. 42]

1919.			
Jan. 1.	1,000 shares pfd. stock Brewster Gordon & Company, Inc.	100,000.00	
July 1.	50 shares Swift & Co.	6,735.50	
	2% dividend on same	100.00	
	50 Swift rights	330.00	
	65 Swift Internacional	3,824.85	
	Dividend on same	78.00	
	55 shares Libby, McNeill & Libby	1,641.11	
			112,709.46

William M. Brewster, Son:

1919.			
Jan. 1.	1,000 shares pfd. stock Brewster Gordon & Company, Inc.	100,000.00	
July 1.	50 shares Swift & Co.	6,735.50	
	2% dividend on same	100.00	
	50 Swift rights	330.00	
	65 Swift Internacional	3,824.85	
	Dividend on same	78.00	
	55 shares Libby, McNeill & Libby	1,641.11	
			$112,709.46

Sallie B. Mulligan, Daughter:

	⅓ Household furniture @ inventory value	1,383.50	

[fol. 43] Rochester Trust & Safe Deposit Co. as trustee for Sallie B. Mulligan, Daughter:

1919.			
Jan. 1.	1,000 shares pfd. stock Brewster Gordon & Company, Inc.	100,000.00	
July 1.	50 shares Swift & Co.	6,735.50	
" "	2% dividend on same	100.00	
	50 Swift rights	330.00	
	65 Swift Internacional	3,824.85	
	Dividend on same	78.00	
	55 shares Libby, McNeill & Libby	1,641.11	
			$112,709.46

E. Franklin Brewster, Jr., Son:

1919.			
Jan. 1.	1,000 shares com. stock Brewster Gordon & Company, Inc.	$100,000.00	
	Cash	12,709.46	
	Plated coffee urn inventoried @	5.00	
	3 pair candle sticks inventoried @	15.00	
	1 gold watch and chain inventoried @	50.00	
	1 pair cuff links inventoried @	15.00	
[fol. 44]	1 stick pin	50.00	
			$112,844.46
	Total		$567,832.80

NOTE.—The Sallie B. Mulligan trust share having been actually sold by the Rochester Trust & Safe Deposit Company as her trustee, the other shares are charged with the net proceeds of her share as determined by such actual sale as follows:

50 Swift at 135 less commissions and taxes $14.90	6,735.50
2% dividend on same July 1, 1919	100.00
50 Swift rights at 6¾ less commissions and taxes $7.50	330.00
65 Internacional at 59 less commissions and taxes $10.15	3,824.85
$1.20 per share dividends on same June 20, 1919	78.00
55 Libby at 30 less commissions and taxes $8.49	1,641.11
Total	$12,709.46

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1928

No. 176

Argued January 17, 1929. Decided February 4, 1929

E. FRANKLIN BREWSTER, Defendant-in-Error,

v.

BERT P. GAGE, Collector of Internal Revenue, Plaintiff-in-Error

In Error to the District Court of the United States for the Western District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Writ of error to the District Court for the Western District of New York. Action by E. Franklin Brewster, plaintiff, against Bert P. Gage, Collector of Internal Revenue, defendant, to recover income taxes alleged to have been illegally collected as additional taxes. Judgment for plaintiff; defendant appeals. Reversed.

Richard H. Templeton, U. S. Atty., of Buffalo, N. Y., C. M. Charest, Gen. Counsel, Bureau of Internal Revenue, and W. H. Trigg, Sp. Atty., Bureau of Internal Revenue, both of Washington, D. C., for plaintiff in error.

Castle & Fitch, of Rochester, N. Y. (J. Sawyer Fitch, of Rochester, N. Y., of counsel), for defendant in error.

MANTON, Circuit Judge:

This action was brought to recover income taxes alleged to have been erroneously and illegally collected as additional taxes for the years 1920, 1921 and 1922. Defendant in error filed his return for these years, and reported profits to him realized on the sale of securities which he received as a residuary legatee under his father's will. His income or profit differs in amount according to the date of the death of his father, May 20, 1918, or the date of distribution,

April 19, 1920. The court below held the profit was determinable by subtracting from the sale price the value of the stock so sold at the date of distribution.

Section 213 of the Revenue Act of 1918, 40 Stat. 1065, in referring to the term "gross income," provides that it does not include "the value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income)." And section 202 (a) of the Revenue Act of 1918 (40 Stat. 1060) provides that, for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, the basis shall be, in the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date, and, in the case of property acquired on or after that date, the cost thereof. Section 202 (a) of the Revenue Act of 1921 (42 Stat. 229) provides that, in ascertaining profit or loss on the sale or other disposition of property acquired after February 28, 1913, "in the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition."

The question presented to us is whether the defendant in error "acquired," as such residuary legatee, the securities which he sold at the date of his father's death or the date of the order of distribution. Upon death, the executor or administrator of an estate obtains legal title, and maintains it during a suitable period of administration; but he holds the property so obtained as a trustee for the proper administration for all the parties interested therein. The legal title of all personal property of a decedent, including chattels and choses in action, vests in the personal representative as of the date of death of the decedent. Schouler on Wills, § 2061. But a legatee under a will, subject to the use of the property for the purpose of administration, acquires that to which he is entitled at the instant of the testator's death. Matter of Lansing, 182 N. Y. 238, 74 N. E. 882; Vail v. Vail, 49 Conn. 52; Cook v. McDowell, 52 N. J. Eq. 351, 30 A. 24; Hardy v. Boaz, 29 Ala. 168. When the testator makes his will, he makes his gift. The rights of the legatee are thus fixed. Of course, his property is subject to his debts, and the residuary legatee's rights to the property he may obtain must stand proportionately the burden of that

obligation. Blood v. Kane, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490.

But the legatee obtains a right which he may convey or devise by will. His is an equitable title. The executor (or administrator, if it be a case of intestacy) must account as the will (or law) directs and perform his trust accordingly. When the decree of distribution is made, it relates back to this original right, and disribution gives to the distributee no new title to the property, but only asserts the property to which title shall attach. Wager v. Wager, 89 N. Y. 161; Foster v. Fifield, 20 Pick. (Mass.) 67; Thompson v. Thomas, 30 Miss. 152. Equitable assets are governed by the same rules as legal assets. Perry on Trusts (6th Ed.) § 357. The owner may sell and dispose of them or make conveyance thereof by will. West v. Burke, 219 N. Y. 7, 113 N. E. 561; Sanders v. Soutter, 136 N. Y. 97, 32 N. E. 638. The legal title which is outstanding in the executor during the period of administration has no value in and of itself, and, had it been sought to have been made the subject of a sale, carrying no right to equitable title, it would have commanded no price nor interfered with the carrying out of the trust of the administrator. To ignore the gain upon so much of the sold title as was equitable would be a subordination of that which is real and substantial to that which is neither. It could not have been the intent of Congress to take the legal title apart or separate from that which would pass as earnings to one who is entitled to the equitable title or beneficial interest in the property.

It surely was not the intent of Congress that the acquisition of a mere legal title should completely wipe out or render untaxable the gain which had been acquired by the equitable ownership, and which was, in fact, realized upon the sale made when the date of distribution arrived. Moreover, it would be an unfortunate construction, which is not demanded by the statute, that would place it within the power of personal representatives and the real owners, namely, the legatees or distributees, to defer distribution in order to escape tax. This should be avoided. Frequently the personal representatives and the beneficiaries are the same persons or members of the same family, and the temptation would be opened, where there is a period of rapidly increasing values, to defer distribution until, in the judg-

ment of all concerned, the peak in the market had been reached, so that thereafter sales of the distributed property would register little or no profit and perhaps losses. It would not do to permit heirs and devisees to bring about a postponement of the acquisition of property for such purposes. Heirs and devisees to realty have legal title vested in them at the date of decedent's death. It is just and reasonable to place both classes of property upon the same basis, without a distinction resting solely upon whether the property be realty or personalty.

The Treasury Department, in considering the Revenue Acts since 1913 and the exemption from income tax of property acquired by gift, bequest, devise or descent (section 4 Act of 1916, 39 Stat. 758; section 1200, Act of 1917, 40 Stat. 329; section 213 (b), subd. 3, Act of 1918, 40 Stat. 1065; Act of 1921, 42 Stat. 238; Act of 1924, 43 Stat. 268, and Act of 1926, 44 Stat. 24 [26 U. S. C. A. § 954]), he consistently held that the basic date for the computation of gain or loss on the sale of property so acquired is that of the decedent's death (paragraph 44, Regulation 33, 1918; article 1562 of Regulation 45, 1919; article 1562 of Regulation 45, 1920; article 1563 of Regulation 62, 1922; article 1594 of Regulation 65, 1924; and article 1594 of Regulation 67, 1926). Great weight will be given to contemporaneous construction of an act of Congress by department officials, who are called upon to act under and carry out its provisions, particularly if there be uncertainty or ambiguity. Swendig v. Washington Co., 265 U. S. 322, 44 S. Ct. 496, 68 L. Ed. 1036; Nat. Lead Co. v. United States, 252 U. S. 140, 40 S. Ct. 237, 64 L. Ed. 496; United States v. Hermanos, 209 U. S. 337, 28 S. Ct. 532, 52 L. Ed. 821; United States v. Finnell, 185 U. S. 236, 22 S. Ct. 633, 46 L. Ed. 890.

Three decisions were referred to in the court below and are urged upon us here. Matter of F. W. Matthiessen, Jr., 2 B. T. A. 921; Alice Fisher Foster v. Commissioner, 7 B. T. A. 1137; Matthiessen v. United States, in the Court of Claims, reported in the Commerce Clearing House Federal Tax Service for 1927, vol. 111, p. 7535. In the Matter of Matthiessen, Jr., supra, the taxpayer was a residuary legatee under the will of his father, who died February 11, 1918, in Illinois, and on March 13, 1918, the executors, trustees, and beneficiaries agreed upon a distribution of the

estate, subject to a provision for refunding pro rata to the executor sufficient funds wherewith to meet liabilities of the estate. Shares of corporate stock which remained in the father's name on November 12, 1918, were made out in the name of Matthiessen, the son. On November 19, 1918, he sold the stock. The board held that he acquired it at the date of the agreed distribution, and not at the date of his his father's death. The board said that it was true the taxpayer did acquire a right on the death of the testator, but that right was not a property right in the stock which was the subject-matter of the transaction involved in the appeal. The most that the taxpayer, as residuary legatee, could do, was to demand at the time of the death of the testator a proper administration of the estate and a distribution of the assets as they remained after all debts and claims were settled. But, under the law, the right to a distributive share of personalty in an estate of an intestate vests instanter in the heir upon the death of the owner and not from the time of distribution. Distribution gives the distributee no new title, but only ascertains the property to which the title attaches. Christie v. Railroad Co., 104 Iowa, 707, 74 N. W. 697.

In United States v. Jones, 236 U. S. 106, 35 S. Ct. 261, 59 L. Ed. 488, Ann. Cas. 1916A, 316, relied upon by the board, involved a succession tax. No account was taken of the vesting in interest, but only the question of the vesting in possession and enjoyment, and it is not in point. The court did say that personal property did not pass "directly from the decedent to the legatees or distributees, but goes primarily to the executor or administrator." This, if course, means that possession and enjoyment by the legatee was postponed. It was there held that, until the distribution, the distributee certainly was not entitled to receive or enjoy any part of the property. Foster v. Commissioner, 7 B. T. A. 1137, followed the Matthiessen Case. Later, Matthiessen, after paying the tax, brought the action in the Court of Claims to recover the taxes found by the board, and also a larger sum; the claim being that his acquisition did not occur until his certificates of stock were handed to him and transferred on the books of the issuing corporation. The Court of Claims followed the board's decision, relying upon United States v. Jones, 236 U. S. 112, 35 S. Ct.

261, 59 L. Ed. 488, Ann. Cas. 1916A, 316. But, for the reasons which we have advanced, we cannot agree with the decisions in the Matthiessen Case, either by the Board of Tax Appeals or in the Court of Claims. These reasons are more persuasive to us, and, with the departmental construction justified by the rules of law, lead us to direct that the judgment below be reversed.

Judgment reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 11th day of February, one thousand nine hundred and twenty-nine.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

E. FRANKLIN BREWSTER, Plaintiff-Appellee,

v.

BERT P. GAGE, as Collector, etc., Defendant-Appellant

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed, with costs. Further ordered that execution be issued for the collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. S., T. W. S.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. E. Franklin Brewster v. Bert P. Gage, as

Coll'r. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 11, 1929. William Parkin, Clerk.

United States of America, Southern District of New York

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 46, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of E. Franklin Brewster, Plaintiff-Appellee, against Bert P. Gage, as Collector, etc., Defendant-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of March, in the year of our Lord one thousand nine hundred and twenty nine, and of the Independence of the said United States the one hundred and fifty third.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 13, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,116. U. S. Circuit Court of Appeals, Second Circuit. Term No. 61. E. Franklin Brewster, petitioner, vs. Bert P. Gage, Collector of Internal Revenue. Petition for writ of certiorari and exhibit thereto. Filed April 4th, 1929. File No. 34,116.

(9030)